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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/511,533	10/15/2004	Paolo Lameri	LAVO-37109	4414
86378	7590	04/29/2010		
Pearne & Gordon LLP 1801 East 9th Street Suite 1200 Cleveland, OH 44114-3108			EXAMINER PURDY, KYLE A	
			ART UNIT 1611	PAPER NUMBER
			NOTIFICATION DATE 04/29/2010	DELIVERY MODE ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

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Office Action Summary

Application No.

10/511,533

Applicant(s)

LAMERI, PAOLO

Examiner

Kyle Purdy

Art Unit

1611

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 1/11/2010.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 8,9,12-21,36 and 37 is/are pending in the application.
- 4a) Of the above claim(s) 14-21 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 8,9,12,13,36 and 37 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB06)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

DETAILED ACTION

Status of Application

1. The Examiner acknowledges receipt of the amendments filed on 1/11/2010 wherein claims 8, 12 and 13 have been amended and claims 36 and 37 are newly added..

2. Claims 8, 9, 12, 13, 36 and 37 are presented for examination on the merits. The following rejections are made.

Response to Applicants' Arguments

3. Applicants arguments filed 01/11/2010 regarding the rejection of claims 22 and 23 made by the Examiner under 35 USC 103(a) over Bratescu et al. (US 6528070) in view of Narayanan et al. (US 5176736) have been fully considered and they are found persuasive. This rejection has been overcome by cancellation of the claims.

4. Applicants arguments filed 01/11/2010 regarding the rejection of claims 26 and 27 made by the Examiner under 35 USC 103(a) over Bratescu et al. (US 6528070) in view of Narayanan et al. (US 5176736) in further view of Huber-Emden et al. (US 3873703) have been fully considered and they are found persuasive. This rejection has been overcome by cancellation of the claims.

5. Applicants arguments filed 01/11/2010 regarding the rejection of claims 8 and 9 made by the Examiner under 35 USC 103(a) over Bratescu et al. (US 6528070) in view of Narayanan et al. (US 5176736) have been fully considered but they are not found persuasive.

6. Applicants arguments filed 01/11/2010 regarding the rejection of claims 12 and 13 made by the Examiner under 35 USC 103(a) over Bratescu et al. (US 6528070) in view of Narayanan

et al. (US 5176736) in further view of Huber-Emden et al. (US 3873703) have been fully considered but they are not found persuasive.

7. The rejection of claims 8, 9, 12 and 13 made by the examiner under 35 USC 103(a) is **MAINTAINED** for the reasons of record in the office action mailed on 02/13/2009.

8. In regards to the 103(a) rejections, Applicant asserts the following:

A) The claims have been amended to show that the instant composition exhibits improved properties which are not disclosed by the prior art.

9. In response to A, the claims as amended do not provide a contribution over the prior art. Claim 8 is basically the same as it was previously, except it now has the limitation that it is 'applied at a rate less than said standard rate and equal to or greater than about 1/3 of standard rate.' The method is still the same, i.e. applying a composition comprising between 15-85% water and between 85-15% oil to agriculture. There is nothing in the claim which distinguishes it from the prior art. Bratescu teaches a composition that meets the claim limitations. The only short coming of Bratescu is that it does not teach a method of using the composition on agriculture. However, that deficiency is remedied by Narayanan. If any person endeavored to use the composition of Bratescu on agriculture, then that method would have the benefit (i.e. requiring 1/3 less of composition) that Applicant is currently claiming.

Maintained Rejections, of Record
Claim Rejections - 35 USC § 103

10. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are

such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

11. Claims 8 and 9 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bratescu et al. (US 6528070; of record) in view of Narayanan et al. (US 5176736; of record).

12. Bratescu is directed to emulsions comprising a blend of surfactants, active agents, oil and water. The emulsions may be employed in agricultural and pesticidal applications (see abstract). The emulsions is to comprise from about 3% to about 70% by weight of an oil and from about 15% to about 97% by weight of water (see column 4, lines 50-65 and claim 1; see instant claims 8, 9, 22 and 23). Exemplified oils include vegetable oils such as olive and castor oil (see column 23, lines 60-65; see instant claims 10 and 24). The emulsions composition may comprise a fungicide (see column 29, line 65).

13. Bratescu fails to teach using the emulsion specifically for agricultural cultivation. Bratescu also fails to teach the vegetable oil as being that of soybean oil as well as the emulsion improving the activity of the fungicide.

14. Narayanan is directed to delivery systems for agricultural chemicals wherein the delivery systems are emulsifiable concentrates. It is taught that the concentrates include an oily component, and an exemplified oil is soybean oil (see column 9, lines 15-20; see instant claims 8 and 9).

15. Therefore, it would have obvious to one of ordinary skill in the art at the time the invention was made to combine the teachings of Bratescu and Narayanan with a reasonable expectation for success in arriving at a method of treating fungi on plants by applying a composition comprising a fungicide, between 15% and 85% water and between 85% and 15% soybean oil. Bratescu teaches such a composition and indicates that fungicides are to be

included. Although Bratescu does not expressly teach using their composition on plants to prevent fungi growth on crops, Bratescu itself provides such a motivation. Bratescu states that their composition may be employed in agricultural applications, and so to a person of ordinary skill such a recitation would serve as a sufficient motivation to use their composition for the treatment of agriculture. With respect to the use of soybean as a vegetable oil in the emulsion, this is obvious. Soybean oil is a commonly used vegetable oil in agricultural emulsions, and thus one would have been motivated to implement in the composition of Bratescu with a reasonable expectation of success. With respect to improving the activity of the fungicide by use of the emulsion, this property would be present upon formulating the composition. Thus, if one were to endeavor to formulate a composition which possessed such ingredients, then such a composition would have properties which would improve the efficiency of the fungicide. Therefore, a method of treating fungi on agriculture using a composition comprising a fungicide, water and oil is *prima facie* obvious to one of ordinary skill in the art at the time the invention was made, as evidenced by the references, especially in absence of evidence to the contrary.

16. Claims 12 and 13 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bratescu et al. (US 6528070; of record) in view of Narayanan et al. (US 5176736; of record) as applied to claims 8, 9, 22 and 23 above, and further in view of Huber-Emden et al. (US 3873703; of record).

17. Bratescu and Narayanan fail to teach the fungi being inhibited as being *Botritis* spp as well as the agriculture being a tomato or potato crop.

18. Huber cures these deficiencies. Huber is directed to fungicidal compositions and methods of killing fungi with said compositions. The composition may be in the form of an emulsion (see column 3, line 25 and line 60). The composition is taught to be useful for combating fungi on grain, corn, rice, vegetable and fruit cultures (see column 3, lines 30-35). The composition is disclosed as capable of inhibiting growth of *Botrytis* and *Verticillium* (see column 3, lines 30-50; see instant claims 12 and 26).

19. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to combine the teachings of Bratescu, Narayanan and Huber with a reasonable expectation for success in arriving at a method of preventing and treating the growth of fungi by administering a fungicidal emulsion wherein the fungi is a *Botrytis* and is growing on a fruit or vegetable crop. Huber teaches that fungicidal emulsions can be applied to inhibit the growth of harmful fungi such as *Botrytis* on fruit and vegetable crops. Albeit Huber doesn't specifically teach and species of vegetable of fruit crop, it would have been obvious to any person of ordinary skill in the art to envision and apply the teachings of Bratescu and Narayanan on vegetable crops such as tomato and potato as well as on fruit crops such as peach and pear. Such a discovery that a fungicidal emulsion is useful for inhibiting growth of fungi upon such crops is not a product of innovation, but rather a product of common sense and ordinary skill in the art. Therefore, a method of inhibiting *Botrytis* and fungi growth on fruit and vegetable crops is *prima facie* obvious to one of ordinary skill in the art at the time the invention was made, as evidenced by the references, especially in absence of evidence to the contrary.

20. The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

21. Claim 37 is rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

22. Claim 37 recites, 'wherein the ratio of (a) rate of application of commercial formulation of fungicidal substance to (b) rate of application of said water emulsion is between 2 to 1 and 1 to 8. Applicant does not have support for such claim language. If Applicant contends that there is support for such a specific limitation, then Applicant is invited to point to the specific page and line of said support. This is a new matter rejection.

23. Applicants attention is directed to MPEP 714.03, "Applicant should also specifically point out the support for any amendments made to the disclosure." Applicant has not done so.

Claim Rejections - 35 USC § 103

24. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

25. Claims 36 and 37 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bratescu et al. (US 6528070; of record) in view of Narayanan et al. (US 5176736; of record).

26. Bratescu and Narayanan are relied upon for disclosure described in the rejection of claims 8 and 9 under 35 U.S.C. 103(a).

27. They fail to teach the fungicidal composition being applied at a rate of about 1/3 the standard rate and the ratio of application of commercial fungicidal substance to the emulsion of the instant composition.

28. Therefore, it would have obvious to one of ordinary skill in the art at the time the invention was made to combine the teachings of Bratescu and Narayanan with a reasonable expectation for success in arriving at a method of treating fungi on plants by applying a composition comprising a fungicide, between 15% and 85% water and between 85% and 15% soybean oil wherein the method requires 1/3 the standard rate of the fungicide. As the method is obvious, any properties stemming therefrom are necessary to the method, e.g. requiring 1/3 less when emulsion is employed. That is, if one of ordinary skill were to arrive at a method of treating agriculture with an emulsion as claimed, then that method would have the benefit of requiring 1/3 less than the standard fungicidal application rate, whether recognized or not. Discovering benefits and properties of old and otherwise obvious methods does not provide a contribution over the prior art. Therefore, a method of treating fungi on agriculture using a composition comprising a fungicide, water and oil is *prima facie* obvious to one of ordinary skill in the art at the time the invention was made, as evidenced by the references, especially in absence of evidence to the contrary.

Conclusion

29. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a).

Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

30. A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

31. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kyle A. Purdy whose telephone number is 571-270-3504. The examiner can normally be reached from 9AM to 5PM.

32. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Sharmila Landau, can be reached on 571-272-0614. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

33. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR

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system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

/Kyle Purdy/

Examiner, Art Unit 1611

April 23, 2010

/David J Blanchard/

Primary Examiner, Art Unit 1643